A

HONG LEONG BANK BHD

v.

RICARDO YAP POW CHOAN

B HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[12-12-2008-III(II)]
19 DECEMBER 2008

C ***LIMITATION:*** *Cause of action - Claim for money owing - Whether appellant's cause of action started to run on date of disposal of vehicle - Whether suit filed within six years limitation period - Whether suit time barred - Orix Credit Malaysia Sdn Bhd v. City Motors*

D ***HIRE PURCHASE:*** *Agreement - Breach - Claim for money owing - Whether appellant discharged burden of proving it had taken reasonable steps to mitigate its claim - Whether Sessions Court Judge correct in dismissing appellant's claim*

E This was an appeal against the decision of the Sessions Court Judge in dismissing the claim of the appellant for money owed by the respondent under a hire purchase agreement. Briefly, the appellant and the second defendant had entered into a hire purchase agreement in respect of the purchase of one unit of Proton Tiara GL (the car) for the sum of RM64,290.75. On 3 F September 1997 the hire purchase agreement was assigned absolutely to the respondent by the second defendant. The respondent defaulted in the installment payments under the hire purchase agreement resulting in the repossession of the car. The car was sold by way of tender on 26 November 1999 for the sum G of RM14,000 leaving a balance of RM38,855.73 still owing. The second defendant made certain partial payments leaving a claim of RM26,852.04 as at 4 April 2007, plus interests of RM9,774.19 at the rate of 8% per annum from 5 April 2007 until the date of full and final payment. The appellant's claims had been dismissed by H the Sessions Court Judge on two grounds (i) the repossession of the car occurred sometime in April 1998 and was disposed off only on 26 November 1999 without any explanation from the appellant as to why it took one and a half years to dispose of the car and (ii) the suit was time barred as it was not filed within the I six years limitation period (item 94 Limitation Ordinance) which started in April 1998 and ended in April 2004. Since the suit was

started only on 23 December 2004, the appellant's claim was time barred. The issues that arose were (a) when did the limitation period for the appellant's claim start to run; (b) whether the Sessions Court Judge was correct in dismissing the plaintiff's claim on the ground that the plaintiff had failed to mitigate its loss by failing to explain why the car was disposed off only on 26 November 1999.

Held (allowing the appeal; setting aside the order made by Sessions Court Judge):

(1) In a hire purchase agreement, the plaintiff's cause of action arose on the date of the disposal of the vehicle as only then the plaintiff would know the actual balance due from the hirer *(Orix Credit Malaysia Sdn Bhd v. City Motors)*. The above principle of law was correct. The cause of action of the appellant started to run on the date of disposal of the car and that was on 26 November 1999 and since the suit was filed on 23 December 2004, it was within the six years limitation period and hence the appellant's suit was not time barred. (para 10)

(2) The appellant had not discharged the burden of proving that it had taken reasonable steps to mitigate its damages. But that in itself did not mean that the appellant's claims must be dismissed as was done by the learned Sessions Court Judge. What she should have done was to ask how that failure to discharge that burden had affected the amount claimed by the appellant. In this appeal, there was no dispute that the respondent had breached the hire purchase agreement and the only issue before the court below was the amount of damages which the appellant was entitled to. The learned Sessions Court Judge had erred in not considering whether the appellant's claim had been affected by its failure to prove that it had taken steps to mitigate its loss. (paras 17 & 18)

[Appellant's claim of RM26,852.04 reduced to RM20,000 and interests of RM9,774.19 at the rate of 8% per annum from 5 April 2007 until the date of full and final settlement and costs to be taxed unless agreed to by the appellant.]

A **Case(s) referred to:**

Goh Ah Ba v. Mohd Zain Sudin [1986] 2 CLJ 282; [1986] CLJ (Rep) 139 SC ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

B *Leftenan-Kolonel Harbajan Singh Jagat Singh & Ors v. Azmi Abdul Rahman [2001] 1 CLJ 198 CA* ***(refd)***

Orix Credit Malaysia Sdn Bhd v. City Motors [2008] 2 CLJ 856 HC ***(refd)***

Selvanayagam v. University of W Indies (PC) 1 WLR 585 ***(refd)***

Tan Kong Min v. Malaysian National Insurance Sdn Bhd [2005] 3 CLJ 825 FC ***(refd)***

C *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA* ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 6(1)(a), 21(1)

Limitation Ordinance (Cap 49) (Sarawak), sch item 94

D

For the appellant - Abang Halit; M/s Loke, King, Goh & Partners

For the respondent - Ricardo Yap Pow Choan

Reported by Suhainah Wahiduddin

E

JUDGMENT

David Wong Dak Wah J:

F **Proceedings**

[1] This is an appeal against the decision of the learned Sessions Court Judge in dismissing the claim of the appellant for money owed by the respondent under a hire purchase agreement.

G **Facts Of Case**

[2] The appellant and one Eva Yap Yoke Lien (2nd defendant) entered into a hire purchase agreement in respect of the purchase of one unit of Proton Tiara GL (the car) for the sum of H RM64,290.75. On 3 September 1997 the hire purchase agreement was assigned absolutely to the respondent by the 2nd defendant. The respondent defaulted in the installment payments under the hire purchase agreement resulting in the repossession of the car. The car was sold by way of tender on 26 November 1999 for the I sum of RM14,000 leaving a balance of RM38,855.73 still owing. The 2nd defendant made certain partial payments leaving a claim

of RM26,852.04 as at 4 April 2007 plus interests of RM9,774.19 at the rate of 8% per annum from 5 April 2007 until the date of full and final payment.

Judgment Of The Learned Sessions Court Judge

[3] From my reading of the grounds of judgment, the appellant's claims were dismissed on two grounds:

i. The repossession of the car occurred sometime in April 1998 and was disposed off only on 26 November 1999 without any explanation from the appellant as to why it took one and half years to dispose of the car. Because of this failure to explain the learned Sessions Court Judge found that the appellant had failed to mitigate their losses and hence had not justified the amount claimed.

ii. The suit is time barred as it was not filed within the six years limitation period (Item 94 Limitation Ordinance) which, in her view, started in April 1998 and ended in April 2004. And since the suit was started only on 23 December 2004, the appellant's claim was time barred.

[4] Issues For This Appeal

i. When did the limitation period for the appellant's claim start to run?

ii. Whether the learned Sessions Court Judge had erred in her findings that repossession of the car took place in April 1998?

iii. Whether the learned Sessions Court Judge was correct in dismissing the plaintiff's claim on the ground that the plaintiff had failed to mitigate its loss by failing to explain why the car was disposed off only on 26 November 1999?

Issue No. 1

[5] On this issue learned counsel of the appellant raised a point of law which was not canvassed at the court below. As such I must ask myself whether I can deal with this point of law. The guidelines are set out by Gopal Sri Ram JCA in *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771:

A Now, I have very carefully perused the record of appeal and find that the point taken in the second primary submission was not raised in the Court below. Ordinarily, this Court will not permit an appellant to raise and argue a point taken in this fashion. The rule is not merely procedural but is one of essential justice. However, the category of cases in which a fresh point may be B permitted to be argued is not closed: it depends upon where the justice of a case lies: *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng* [1995] 3 CLJ 520. The question that arises is whether the instant appellant ought to be permitted to argue the point that he has taken in his second primary submission.

C

I must confess that this question has caused me a great deal of difficulty.

But, having considered all the relevant material that is before this Court, I have come to the decision that, in the interest of justice, D the point raised ought to be considered. In the first place, no objection was taken by Senior Federal Counsel at the hearing of this appeal to the point being argued.

Secondly, I have formed the view that no injustice will be occasioned to the respondents if the point is allowed to be taken E because no new evidential material is involved in the issue raised. Further, the point taken concerns the very same Constitutional provisions that are germane to the issues that were in fact raised and argued in the Court below. I shall therefore proceed to consider and deal with all the submissions directed upon this point F before this Court.

[6] Similar sentiments can be found in the case of *Leftenan-Kolonel Harbajan Singh Jagat Singh & Ors v. Azmi Abdul Rahman* [2001] 1 CLJ 198 where Haidar CJM said:

G We agree that generally the appellate courts are reluctant to allow points of law or issues to be raised when they were not raised at first instance (see *AG for Straits Settlement v. Pang Ah Yew* [1934] MLJ 184, *Central Bank of India v. Guardian Assurance Co. Ltd.* [1936] MLJ 163, *Hassan & Anor. v. Wan Ishak & Ors.* [1961] H MLJ 45. However, there are decided cases to show that there is a discretion in the appellate court to allow a point of law or issues not otherwise raised at the court below to be raised on appeal. The appellate court would exercise its discretion when the point raised relates to jurisdiction or illegality and not merely technical. In this respect, Abdul Hamid FJ (as he then was) in *S. Mariappan v. Government of Malaysia* [1983] 2 MLJ 340 at p. 342 I said:

In the present case the facts are not in dispute. The point raised cannot be said to be merely technical but is related to jurisdiction to be determined by reference to certain provision of the constitution and service Regulations. As we are of the view that the point raised relates to jurisdiction and the facts are not in dispute, we accordingly exercised our discretion and allowed the point or issue to be argued before us.

[7] Coming back to this appeal, the point raised concerns an issue of when the limitation period starts to run and such issue can be dealt with based on the undisputed evidence before the court and hence the respondent could not be said to be prejudiced by any surprise. It was just a mere omission by the counsel not to have argued this point before the Sessions Court Judge. Furthermore it is not a point of technicality but a point which affects whether the suit can be sustained. Accordingly I allow this point of law to be argued before me.

[8] It is the contention of the counsel for the appellant that the limitation period can only start to run after the sale of the car in 26 November 1999 and for this he relied on the case of *Tan Kong Min v. Malaysian National Insurance Sdn Bhd* [2005] 3 CLJ 825 where the facts were these. The appellant there had in 1984 created a first charge over his land as security for banking facilities with the respondent bank. The appellant defaulted resulting in the foreclosure of the secured land on 16 March 1992. The sale proceeds from the foreclosure was not enough to repay the respondent bank, leaving a balance of RM336,012.52 owing. Letter of demand was issued to the appellant for payment of the outstanding sum. The respondent failed to comply with the demand resulting in a suit issued by the appellant on 17 January 1995. The suit was dismissed by the learned Judicial Commissioner but on appeal the decision was reversed. Dissatisfied with that decision the appellant appealed to the Federal Court and posed the following questions for consideration:

(1) Whether a claim for balance after sale was a claim founded on contract and therefore subject to the limitation period of six years under s. 6(1)(a) of the Limitation Act 1953 ('the Act'), or a claim for money secured by charge on land and therefore subject to the 12-year limitation period under s. 21(1) of the Act?;

(2) If a claim for balance after sale was a contractual claim subject to the six-year limitation under s. 6(1)(a) of the Act, when would the cause of action accrue and the limitation period begin?;

(3) If a claim for balance after sale was a claim for money secured by a charge on land and subject to the 12-year limitation under s. 21(1) of the Act when did that cause of action accrue and the limitation period begin?

[9] The Federal Court through the judgment of Alauddin bin Dato' Mohd Sheriff FCJ (as he then was) held that the point in time where all the material facts were said to be in existence to render the cause of action would be after the sale had been conducted and the differential amount remaining due had been ascertained and that time would be when the property was sold by auction. Counsel also refers the court to the case of *Orix Credit Malaysia Sdn Bhd v. City Motors* [2008] 2 CLJ 856 where the learned judge held that in a hire purchase agreement, the plaintiff's cause of action arises on the date of the disposal of the vehicle as only then the plaintiff would know the actual balance due from the hirer.

[10] I am not only of the view that the above principle of law is correct, but am also bound by the decision of the Federal Court and applying the principle of law as stated there, I find that the cause of action of the appellant starts to run on date of disposal of the car and that is on 26 November, 1999 and since the suit was filed on 23 December 2004, it is within the six years limitation period and hence the appellant's Suit is not time barred.

Issue No. 2

[11] The learned Sessions Court Judge had found as a fact that the repossession of the car occurred in April 1998. Her reasons are as follows:

> Relevant to a decision on this issue is the notice of intention to repossess the car. Now the intention to repossess the vehicle which was undated (at page 7 ExP1) but was posted on 10th February 1999 (see page 8 Ex P1) stated the amount of overdue installment as at the time of notice of RM5837.82. Each installment was RM551.79 so it is therefore correct to say that roughly 10 installments have not paid since the notice was posted. Working backwards from 10th February 1999, the first unpaid installment would be April 1998 as alleged by Ricardo Yap. This

would lend support to Ricardo Yap's contention that he surrendered the car or the Bank repossessed the car (as pleaded in the defense) sometime in 1998.

[12] This finding is attacked by counsel for the appellant on the ground that the finding was without any factual basis. Further he submitted that the date of repossession was 15 July 1999 by virtue of the authority to repossess dated 22 June 1999. (p. 114 of ROA).

[13] To resolve this conflict, I started off by going to first base and that is to restate the obvious – the burden of proof lies with the appellant to prove its case. On this issue the appellant sought to rely on the testimony of PW1 who is the Unit Head of the Kuching HP Collection Center of the appellant and the authority to repossess. From the outset, it is not disputed that the agreed bundle of documents (of which the authority to repossess is one of documents) was admitted only as to the authenticity but not as to the contents. What that means is clearly set out by Gopal Sri Ram JCA in *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 at p. 531:

Having considered the arguments of counsel on both sides and the authorities cited by them, I am of opinion that the following propositions may be taken as well-settled:

(1) Whether the contents of a document that has been included in an agreed bundle may be used by either party to prove or disprove a fact in issue depends entirely upon the terms of the agreement between the solicitors having conduct of an action. If by their agreement they dispense with formal proof and also agree to the truth of the contents of a particular document, then its contents may be relied upon either side to establish or to disprove a fact in issue. **On the other hand, if the agreement is only to forgo proof of the making of the document, then, the contents may not be so used.** See, *Yew Lean Finance Development (M) Sdn. Bhd. v. Tan Gin Thong (supra)*.

(2) Where a document is included in an agreed bundle without any qualification, then no question as to its formal proof arises and its contents may be relied upon to establish a fact in issue. See, *Henry Trading Co. Ltd. v. Harun [1966] 2 MLJ 281; Borneo Co. (M) Sdn. Bhd. v. Penang Port Commission* [1975] 2 MLJ 204.

(3) A party may rely upon an admission made by his opponent in a police report (whether or not it be first information) or other documentary hearsay included in an agreed bundle on the condition that only its formal proof is dispensed with: *M.A. Clyde*

A *v. Wong Ah Mei (supra); Tan Song Gou v. Goh Ya Tian (supra)*. However, if such a document is wholly exculpatory of the maker, then it is pure hearsay and inadmissible: *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ 175; *Chuah Ah Chee & Ors v. Gurdial Singh & Anor (supra)*. The reasons for its inadmissibility appear sufficiently in the judgment of Ali FJ in Wong Thin Yit and that of Edgar Joseph Jr J in Chuah Ah Chee. They therefore require no reiteration here.

[14] The effect of the above principle of law is this. PW1's evidence and the notice to repossess are hearsay evidence which C this court cannot take into account which means that the appellant had not produced any evidence as to the date of repossession of the car. To prove the date of repossession the appellant must produce in court the maker of the notice of repossession and the person who repossessed the car. On the D side of the respondent, he himself testified as to the date of repossession of the car which was done by surrendering the car to the appellant's representative at Hyperformance Automobile sometime in 1998 as alleged in his defense. This can be done pursuant to condition 6 of the Hire Purchase Agreement which E provides that the hirer can terminate the agreement by surrendering the car. His version of the event is in fact corroborated by the undisputed fact that the car was repossessed at the repair shop called Hyperformance Automobile. Accordingly I see no reason to depart from the finding of fact by the learned F Sessions Court Judge. This brings me to third issue which I will now deal with.

Issue No. 3

G **[15]** To recap, this issue concerns the learned Sessions Court Judge's dismissal of the appellant's claim on the ground that the appellant had failed to mitigate its loss by failing to explain why the car was disposed off only on 26 November 1999 when the car was repossessed in April 1998.

H **[16]** The learned Sessions Court Judge was of course correct to say that the law requires the appellant to mitigate its loss. (*Goh Ah Ba v. Mohd Zain Sudin* [1986] 2 CLJ 282; [1986] CLJ (Rep) 139). Not only that the appellant bears the burden of proving that it had mitigated the loss. Authority for this proposition can be I found in the Privy Council case of *Selvanayagam v. University of W. Indies* (PC) 1 WLR 585 where Lord Scarman at 589 held:

> Their Lordships do not doubt that the burden of proving reasonableness was upon the plaintiff. It always is, in a case in which it is suggested that, had a plaintiff made a different decision, his loss would have been less than it actually was. The point was succinctly made in an admiralty case of collision at sea by Lord Merriman P.: *The Guilford* [1956] P. 364, 370. Their Lordships would add a further comment on the law, well established though it is. The rule that a plaintiff who rejects a medical recommendation in favour of surgery must show that he acted reasonably is based upon the principle that a plaintiff is under a duty to act reasonably so as to mitigate his damage. Their Lordships respectfully agree with the opinion expressed on the point by the High Court of Australia in *Fazlic v. Milingimbi Community Inc.* [1982] 56 ALJR 211, 214, to which they were helpfully referred by counsel for the plaintiff. The question is one of fact and, as already mentioned, the burden of proof is on the plaintiff. In *Richardson v. Redpath, Brown & Co. Ltd.* [1944] AC 62, 68 Viscount Simon LC said that the material question is "whether the workman" (i.e. the plaintiff) "who refuses to be operated upon is acting reasonably in view of the advice he has received." Their Lordships would, with respect, put the question in more general terms. Though the advice received will almost always be a major factor for consideration, the true question is whether in all the circumstances, including particularly the medical advice received, the plaintiff acted reasonably in refusing surgery. Their Lordships note that in *Fazlic*'s case, at p. 213, the High Court of Australia took the same view. For these reasons, their Lordships are of the opinion that the Court of Appeal was wrong to reverse the judge. He was right to treat the question as one of fact and to put the burden of proof upon the plaintiff. And there was evidence upon which he could properly conclude that the plaintiff had discharged it.

[17] The issue which confronts me now is whether the appellant in this case discharged this burden? As noted by the learned Sessions Court Judge, there was of course no explanation as to why the appellant took a period of 19 months to dispose of the car. The only proof of damages provided by the appellant was the disposal price of the car and the amount owed by the respondent at the time of disposal. With respect this is not enough. What is required in discharging this burden of proof is tendered to the court the following:

i. An explanation as to why it took 19 months to dispose of the car such as the number of attempts in disposing off the car.

A ii. Evidence that the disposal price of the car was the market value of the car as at the time of disposal. In this respect there must be evidence before the court that the disposal price was reflective of the sale price of cars of similar age and condition.

B iii. The report of the car repossesser must be tendered in court to show the length of time it took to repossess and the condition of the car at the time of repossession and disposal.

C **[18]** In the circumstances I find that the appellant had not discharged the burden of proving that it had taken reasonable steps to mitigate its damages. But that in itself does not mean that the appellant's claims must be dismissed as was done by the learned Sessions Court Judge. What she should have done was to ask how that failure to discharge that burden had affected the amount claimed by the appellant.

D

[19] In this appeal there is no dispute that the respondent had breached the hire purchase agreement and the only issue before the court below was the amount of damages which the appellant is entitled to.

E

[20] In view of the above, I find that the learned Sessions Court Judge had erred in not considering whether the appellant's claim had been affected by its failure to prove that it had taken steps to mitigate its loss.

F

[21] In the circumstances, I allow the appeal with costs, set aside the order made by the learned Sessions Court Judge and reduce the appellant's claim from RM26,852.04 to RM20,000 and interests on RM9,774.19 at the rate of 8% per annum from 5 April 2007 until the date of full and final settlement and costs to be taxed unless agreed to by the appellant for here and below.

G

[22] Order accordingly.

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